Attorneys’ Fees in Complex Litigation

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Agenda

1. Statutory Fee Shifting
2. Percentage-of-the-fund Approach
3. Lodestar Cross-Check
4. MDL Assessments
5. Quasi-Class Actions
6. Objectors
1. Statutory Fee Shifting: Summary

  - Attorney fees based on the lodestar may be enhanced for superior attorney performance, but only in “extraordinary circumstances”
  - Overturns fee enhancement based on trial judge’s conclusion that lawyers had exhibited a “higher degree of skill, commitment, dedication, and professionalism than the Court has seen displayed during its 27 years on the bench” 130 S.Ct. at 1670
    • Challenge to GA’s foster-care system; results in sweeping consent decree
    • Lodestar award: $6.1 million
    • Performance enhancement: $4.5 million
1. Statutory Fee Shifting: Enhancements

  
  - 3 situations where enhancements may be appropriate (1674-76):
    1. Hourly rate measurement does not capture attorney’s true market value
    2. Extraordinary outlay of expenses/exceptionally protracted litigation
    3. Exceptional delay in payment of fees
  
  - “There is a strong presumption that the lodestar is sufficient; factors subsumed in the lodestar calculation cannot be used as a ground for increasing an award above the lodestar; and a party seeking fees has the burden of identifying a factor that the lodestar does not adequately take into account and proving with specificity that an enhanced fee is justified.” 130 S.Ct. at 1669.
  
  - Concurrences:
    - Kennedy: “only in the rarest circumstances” 130 S.Ct. at 1677
    - Thomas: “precise limitations...on the availability of such enhancements” 130 S.Ct. at 1678
1. Statutory Fee Shifting: Calculating the Lodestar

  - Lodestar award “roughly approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case.” *Kenny A.*, 130 S.Ct. at 1672.
- Prevailing market rates = rates charged by defense counsel?
  - “*Perdue* never requires or even hints at the plaintiffs’ proposition: that their hourly rates should approximate those charged by defense counsel.” *McClain v. Lufkin Industries, Inc.*, No. 10-40036, 2011 WL 3427105, at *7 (5th Cir. Aug. 8, 2011).
2. Percentage-of-the-fund Approach: Summary

- “[A] percentage of the fund approach should be the method utilized in most common-fund cases, with the percentage being based on both the monetary and the nonmonetary value of the judgment or settlement.”
  - Principles of the Law of Aggregate Litigation, §3.13(b)
- “[I]n the traditional common-fund situation…the district court...should attempt to establish a percentage fee arrangement agreeable to the Bench and plaintiff’s counsel.”
2. POF Approach: Choice of POF vs. Lodestar

- **Disadvantages of lodestar:**
  - (1) greater workload for judicial system
  - (2) unpredictable results
  - (3) unwarranted sense of precision
  - (4) subject to judicial manipulation
  - (5) leads to lawyers billing excessive hours
  - (6) disincentive for early settlement
  - (7) insufficient flexibility given to judges
  - (8) disadvantages public interest bar
  - (9) lack of predictability in administration

2. Percentage-of-the-fund Approach: Choice of POF vs. Lodestar

- Choice of POF vs. lodestar in common fund cases
  - In most circuits, courts have discretion to use POF or lodestar
  - 3 circuit courts have held that POF is the exclusive method
    - *Camden I Condo. Ass’n v. Dunkle*, 946 F.2d 768 (11th Cir. 1991)
  - National trend is towards POF
    - “[T]oday, the percentage method is explicitly the dominant method for calculating fees.”
2. POF Approach: Empirical Studies

  - Analysis of 688 class action settlements in 2006 and 2007
  - Percent of total settlement amounts awarded in fees and expenses:

<table>
<thead>
<tr>
<th>Subject Matter</th>
<th>2006</th>
<th>2007</th>
</tr>
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<tbody>
<tr>
<td>Securities</td>
<td>11%</td>
<td>20%</td>
</tr>
<tr>
<td>Consumer</td>
<td>24%</td>
<td>9%</td>
</tr>
<tr>
<td>Antitrust</td>
<td>26%</td>
<td>24%</td>
</tr>
<tr>
<td>Commercial</td>
<td>29%</td>
<td>15%</td>
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<tr>
<td><strong>Total</strong></td>
<td><strong>13%</strong></td>
<td><strong>20%</strong></td>
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- Method of awarding fees:
  - POF approach applied in 69% of settlements; lodestar method employed in 12%
  - In other settlements, court did not state its method or used another method altogether
2. POF Approach: Empirical Studies

- Fitzpatrick Study (ct’d)
  - Summary Statistics on POF Approach
    - POF approach used (with or without lodestar cross-check) 69% of the time
    - Most awards between 25-35% of settlement; almost no awards greater than 35% of settlement
    - Mean = 25%; median = 25.4%
    - Minimum = 3%; maximum = 47%
    - No significant variation by litigation subject
  - Lower Fees in “Mega-Fund” Cases

<table>
<thead>
<tr>
<th>Settlement Size ($MM)</th>
<th>Mean</th>
<th>Median</th>
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<tbody>
<tr>
<td>$72.5 - $100</td>
<td>23.7%</td>
<td>24.3%</td>
</tr>
<tr>
<td>$100 - $250</td>
<td>17.9%</td>
<td>16.9%</td>
</tr>
<tr>
<td>$250 - $500</td>
<td>17.8%</td>
<td>19.5%</td>
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<tr>
<td>$500 - $1,000</td>
<td>12.9%</td>
<td>7.2%</td>
</tr>
<tr>
<td>$1,000 - $6,600</td>
<td>13.7%</td>
<td>9.5%</td>
</tr>
</tbody>
</table>
2. POF Approach: Empirical Studies

  - Analysis of 689 class action settlements from 1993-2008
    - Mean award = 23%; median award = 24%
  - Frequency of Methods of Computing Fees
    - Decline in the use of the pure lodestar method
    - “[T]he percent method is the overwhelmingly dominant method of computing fees, either as the sole method or as the primary method with the lodestar as a check.” (Eisenberg and Miller, at 268).

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Lodestar</td>
<td>13.6%</td>
<td>9.6%</td>
</tr>
<tr>
<td>POF</td>
<td>56.4%</td>
<td>37.8%</td>
</tr>
<tr>
<td>Both (POF is usually dominant, lodestar is a check)</td>
<td>24.3%</td>
<td>42.8%</td>
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</table>
3. Lodestar Cross-Check: Summary

• First extensive discussion in 1995 in case where value of settlement award is uncertain
  ▫ *In re General Motors Corp. Pick-Up Truck Tank Products Liability Litigation*, 55 F.3d 768 (3d Cir. 1995) (MDL No. 961)

• Less relevant where value of settlement is obvious
  ▫ “[A] percentage-of-the-fund approach should be the method utilized in most common-fund cases...The court may consider using the “lodestar” approach as a cross-check, particularly when the value of the judgment or settlement is uncertain.”
3. Lodestar Cross-Check: History

  - First district court to explicitly discuss cross-check
    - Securities class action settlement for payment of $14M
    - Counsel awarded 30% of net recovery after deduction of expenses and incentive award
    - “In the present case the lodestar method will be used as a cross-check on the percentage method, as often must be done to assure a fair and favorable result.”

- *In re General Motors Corp. Pick-Up Truck Tank Products Liability Litigation*, 55 F.3d 768 (3d Cir. 1995) (MDL No. 961)
  - Earliest influential discussion of cross-check by circuit court
    - Court vacates fee award of $9.5M in products liability action; settlement agreement provided class members with $1,000 coupons
    - “[T]he district court on remand needs to make some reasonable assessment of the settlement’s value and determine the precise percentage represented by the attorneys’ fees. The problem, however, is not so simple, for arguably, any settlement based on the award of certificates would provide too speculative a value on which to base a fee award.”
      - 55 F.3d 768, 822
    - “On remand, the district court might wish to examine the fee primarily under the percentage of recovery scheme...The court may however, as a check, want to use the lodestar method to assure that the precise percentage awarded does not create an unreasonable hourly fee.”
      - Id.
3. Lodestar Cross-Check: History

- Increasing prevalence of cross-check post 
  \( \text{GMC} \)
  - In the 3 years after \( \text{GMC Products Liability Litigation} \), 11 district courts use lodestar cross-check; 10 rely on \( \text{GMC} \)
    - Settlement values are not necessarily speculative nor the settlements coupon settlements
  - \(3-4\) cross-checks/year in mid-to-late 1990s; approximately \(12\)/year in early-to-mid 2000s
    - “The lodestar is at least useful as a cross-check on the percentage method by estimating the number of hours spent on the litigation and the hourly rate. . . .”
3. Lodestar Cross-Check: Today

• Cross-check originates from case where value of settlement is uncertain
• Less relevant today in light of CAFA Consumer Bill of Rights
  ▫ Restrictions on coupon settlements
  ▫ Coupon settlement attorney’s fee provisions
• No need to delay approval of settlement agreed upon at an early stage of proceedings with a cross-check
  ▫ “[A]n early resolution may demonstrate that the parties and their counsel are well prepared and well aware of the strength and weaknesses of their positions and of the interests to be served by an amicable end to the case.”
4. MDL Fee Assessments: Summary

- MDL’s authority to assess attorneys’ fees is well-established
  - “MDL courts have consistently cited the common fund doctrine as a basis for assessing common benefit fees in favor of attorneys who render legal services beneficial to all MDL plaintiffs...In addition to judicial precedent the Court also finds authority to assess common benefit attorneys’ fees in its inherent managerial authority.”
4. MDL Fee Assessments: Disputes

  - 6% deemed a reasonable “benchmark percentage”
    - “To determine an appropriate common benefit fee in this case the Court looks to comparable MDL set-aside assessments and awards of common benefit fees.” 760 F. Supp. 2d at 654.
  - Adjusts upward to 6.5% based on certain *Johnson* factors: time/labor involved, amount involved/results obtained

  - Originally 9% federal and 6% state assessments; later reduced to 6% and 4%
5. Quasi-Class Actions: Summary

- Origins of the concept
  - “Consolidations should be treated for some purposes as class actions to assure judicial review of fees and settlements.”
    - “By this order the court exercises its power to control legal fees in a coordinated litigation of many individual related cases—in effect, a quasi-class action.”
5. Quasi-Class Actions: Pre-Zyprexa

- 2 meanings of the term:
  - (1) collective action under FLSA §216(b)
  - (2) actions that resemble a class actions in certain ways

- FLSA §216(b)
  - Employees may maintain an action against employer “on behalf of himself or themselves and other employees similarly situated”
  - Fundamentally different from Rule 23: members need to opt in; Rule 23 prerequisites are unnecessary in a §216(b) collective action
  - Courts rarely use the term “quasi-class action” in this context

- Other actions that resemble class actions
  - Referring to NLRB’s decision to grant relief to 13 individuals when only evidence of one of the individuals had been considered: “We...disapprove of the quasi-class-action aspect of this case.”
  - Refusing to add additional plaintiffs to a complaint: “the naming of additional plaintiffs would essentially amount to the grant of permission for plaintiffs to go forward in a quasi-class action which the Court has determined not to be appropriate”
    - *Sweat v. City of Fort Smith*, 265 F.3d 692, 698 (8th Cir. 2001)
  - Noting similarities between a class action and objections to granting of a debtor’s discharge: “In addition to the general body of creditors as beneficiaries of a quasi-class action pursuant to [11 U.S.C.] §727(a), the moral basis of the bankruptcy statute is also affirmed when a dishonest debtor is denied discharge.”
5. Quasi-Class Actions: Judge Weinstein, pre-Zyprexa

- Weinstein 1994 law review article:
  - “[M]ass consolidations are in effect quasi-class actions.”
  - “Consolidations should be treated for some purposes as class actions to assure judicial review of fees and settlements.”
  - Consolidated criminal and civil action; parties joined under Rule 19
  - “In effect a civil quasi-class action.” *Id.* at 148.
  - Treated like a class action:
    - Extensive post-settlement, post-plea hearings
    - Approved civil action fee of attorney for plaintiffs
- *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, 133 F. Supp. 2d 162 (E.D.N.Y. 2001)
  - Plaintiff health insurer alleged tobacco company’s conduct increased costs; Weinstein dismisses defendants’ summary judgment motion
  - “Defendants have not raised the point that, in a sense the class action or quasi-class action such as the present one, where many claims are aggregated, takes care of the problem of social payment for the full cost of damages a defendant caused.” *Id.* at 178.
5. Quasi-Class Actions: Zyprexa

  ▫ Consolidated action of ~ 8,000 individual plaintiffs against Eli Lilly re: safety of schizophrenia drug.
  ▫ Judge Weinstein issued an order setting caps on attorney compensation: “By this order the court exercises its power to control legal fees in a coordinated litigation of many individual related cases—in effect, a quasi-class action.” *Id.* at 490.
• 2 sources of authority: (1) class action law and (2) authority to exercise ethical supervision over attorneys
• 4 factors which made Zyprexa similar to a class action:
  1. The large number of plaintiffs subject to the same settlement matrix approved by the court
  2. Use of special masters for discovery and settlement
  3. The court’s order for a large escrow fund
  4. Other interventions by the court
  • *Id.* at 491.
• Authority to exercise ethical supervision over attorneys
  ▫ Courts can assure that attorneys’ fees are not excessive, regardless of whether a party has challenged such fees
  ▫ Overly compensated attorneys can deter socially beneficial mass litigations
  ▫ Court was the only body able to control fees
5. Quasi-Class Actions: Application of Zyprexa

• In re Guidant Corp. Implantable Defibrillators Products Liability Litigation 2008 WL 682174 (D. Minn. 2008) (MDL No. 1708)
  ○ Consolidated actions against manufacturer of defibrillator
  ○ Settlement allows court to determine amount of “common benefit payment” to plaintiffs’ attorneys whose work benefits the class as a whole
  ○ Attorneys request payment from settlement fund; court grants in part and denies in part
  ○ Grounded in same sources of authority as Zyprexa: (1) the case had the “hallmarks” of a class action; (2) it had power to exercise ethical control over fees
    • Id. at *17-18.

• In re Vioxx Products Liability Litigation, 574 F. Supp. 2d 606 (E.D. La. 2008) (MDL No. 1657)
  ○ Court caps attorneys fees in consolidated action by users of Vioxx (pain relief drug) against Merck
  ○ 3 sources of authority
    • (1) Authority under Rule 23
      • 3 of 4 Zyprexa factors are met:
        1 Large number of plaintiffs subject to the same settlement matrix
        2 Special masters used
        3 Large settlement fund, held in escrow
    • (2) Authority to exercise ethical supervision over attorneys
      • “[G]rowing need to to protect the public’s trust in the judicial process.”
        • Id. at 613.
    • (3) Parties agreed that the court would “oversee various aspects of the administration of settlement proceedings, including...allocating a percentage of the settlement proceeds to a Common Benefit Fund.”
6. Objectors: Summary

• Federal Rules of Appellate Procedure, Rule 7. Bond for Costs on Appeal in a Civil Case:
  ▫ In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal.

• Federal Rules of Civil Procedure, Rule 62(d). Stay with Bond on Appeal:
  ▫ If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a)(1) or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.
6. Objectors: Bonds

- Some courts require objectors to post Rule 7 bonds
  - *Vaughn v. American Honda Motor Co.*, 507 F.3d 295 (5th Cir. 2007)
    - District court required any objector to post $150,000 bond
      - “[T]he amount of the bond should reflect the significant possibility that any objector’s will be subject to Fed. R. App. P. 38”
    - Court of appeals reduced bond to $1,000; district court abused its discretion in basing the amount of the bond on the probability that an appeal would be “summarily denied”
      - *Vaughn v. American Honda Motor Co.*, 507 F.3d 295, 299 (5th Cir. 2007)
  - Can Rule 7 bonds include attorney’s fees?
      - Court requires objector to post $25,000 bond
        - Bond includes taxable costs
        - “Costs for delay and attorneys’ fees...are not appropriate.”
        - “Aside from the fact that Section 11(e) of the Securities Act of 1933 does not provide for delay costs, section 11(e) does not apply here because Objectors are not bringing a “suit” under this statute...In addition...section 11(e) is not a fee-shifting statute.”
          - 728 F. Supp. 2d 289, 296.
      - *Azizian v. Federated Dept. Stores, Inc.*, 499 F.3d 950 (9th Cir. 2007)
        - District court required objector to settlement of antitrust claims to post bond that included taxable appellate costs and appellate attorneys fees
        - Court of appeals: district court erred by requiring security in the Rule 7 bond for attorney’s fees under Clayton Act
          - “[A] district court may require an appellant to secure appellate attorney’s fees in a Rule 7 bond, but only if an applicable fee-shifting statute includes them in its definition of appellate costs.”
          - “However. [Section 4 of the Clayton Act] does not authorize taxing attorney’s fees against a class member/objector challenging a settlement in an antitrust suit.”
            - 499 F. 3d 950, 952.
6. Objectors: ALI Approach

- Principles of the Law of Aggregate Litigation §3.08: *Court Rejection Of Proposed Settlement; Attorneys’ Fees For And Against Objectors*
  - “If objectors demonstrate that a settlement should be rejected in its entirety, and if a classwide judgment or settlement is later obtained in a new or reconfigured case involving the same basic allegations of wrongdoing, the objectors to the first settlement should be permitted to recover reasonable fees if they can demonstrate that their efforts in challenging the prior settlement were instrumental in laying a basis for the ensuing benefit enjoyed by the class.”
  - “If the court concludes that objectors have lodged objections that are insubstantial and not reasonably advanced for the purpose of rejecting or improving the settlement, the court should consider imposing sanctions against objectors or their counsel under applicable law.”